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Legal Bases for Coalition Combat Operations in Iraq, May 2003–Present

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I. Introduction

US combat operations in Iraq in 2003 began with airstrikes on March 19 and swiftly overwhelmed the Iraqi armed forces. Within six weeks, US and coalition forces were in control of almost all major cities in Iraq, and Saddam Hussein's army was considered defeated. On May 1, 2003, from the deck of the *USS Abraham Lincoln*, President Bush famously declared that major combat operations in Iraq had ended.¹ His observation that "Americans, following a battle, want nothing more than to return home [a]nd that is your direction tonight" proved, however, to be premature. Six-and-a-half years later, 120,000 US troops remain in Iraq.² This article examines the legal underpinnings for US-led military operations in Iraq following the defeat of regular Iraqi military forces.

International law reflects a number of legal bases on which a State may undertake military operations in foreign territory. The most common legal grounds include a State's exercise of self-defense, the authorization of the United Nations Security Council and the consent of the foreign State. A further ground, though it may at first glance appear to conflate issues of *jus ad bellum* and *jus in bello*, is found in the obligations of an occupying State under the laws of war. Each of these legal

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grounds has formed a basis—often in overlapping and interdependent ways—for the US military operations in Iraq during the past six-and-a-half years.

For purposes of this paper, the US presence in Iraq will be examined in three phases: first, during the occupation of Iraq, which formally ended on June 28, 2004; second, the period following the end of formal occupation until December 31, 2008; and finally, the current period, which began on January 1, 2009, and continues today.

II. Belligerent Occupation of Iraq (May 2003 to June 28, 2004)

Whether a territory is occupied is a question of fact, namely, whether “it is actually placed under the authority of the hostile army.”³ This requirement includes both a physical and an administrative component: an occupying power must both have firm physical possession of enemy territory and substitute its authority for that of the local government in that area. Occupation “extends only to the territory where such authority has been established and can be exercised.”⁴

While it may be difficult to establish from public records specific dates on which particular areas of Iraq became occupied by US and coalition forces, contemporaneous documents indicate that the occupation of Iraq more or less in its entirety was established by mid-May 2003. In a letter to the President of the UN Security Council on May 8, 2003, the US and UK Permanent Representatives to the United Nations announced the establishment of the Coalition Provisional Authority (CPA) “to exercise power of government temporarily.”⁵ While the word “occupation” appears nowhere in the letter, it nonetheless made clear that the United States and the United Kingdom, through the CPA, undertook the role and responsibilities of powers belligerently occupying Iraq under the laws of war. Subsequently, on May 22, 2003, the UN Security Council, noting the May 8 letter, “recogniz[ed] the specific authorities, responsibilities, and obligations under applicable international law of [the United States and the United Kingdom] as occupying powers under unified command.”⁶

The insurgency emerged soon afterward, with attacks directed not only against US and coalition forces, but against Iraqis perceived to be “collaborating” with the coalition, emerging Iraqi political leaders, and Iraqi police and military forces. Insurgent targets included the UN headquarters, the Jordanian Embassy, the Al Rasheed hotel, power stations, foreign companies and oil installations. The insurgents themselves were composed of various groups, including Shia militants, foreign fighters with anti-coalition motives, Al Qaeda in Iraq and Iraqi nationalists (most of whom were Baath Party members). With the exception of the Baathists, none of the insurgent groups represented or was loyal to the government of

Saddam Hussein. Their tactics included the use of car bombs, improvised explosive devices, suicide bombs, hostage taking and indiscriminate rocket attacks. Insurgents often intentionally targeted Iraqi and foreign civilians and evidenced little regard for civilian casualties when targeting military objects.⁷

Throughout the time they were present in Iraq, US and coalition forces retained the right of individual self-defense, that is, the right to use force to defend themselves against attacks by hostile forces. US and coalition forces also, however, undertook offensive military operations to combat the insurgency. During the period of occupation, the basis under international law for these operations derived from two sources. The first ground stems from the rights and obligations of the occupying power under laws of war to provide for public order. A second and supplemental ground was conveyed in the October 16, 2003 UN Security Council authorization for coalition forces “to take all necessary measures to contribute to the maintenance of security and stability in Iraq.”⁸

Law of War

While the lawfulness of the US invasion of Iraq remains a matter of debate,⁹ it has no bearing on the rights and obligations of the occupying US and coalition forces and the occupied population once that relationship is established. The *Hostages Trial* at the International Military Tribunal at Nuremberg¹⁰ affirmed that whether or not an initial act of invasion was lawful is a *jus ad bellum* question separate and legally distinct from the *jus in bello* rules concerning an occupant’s (and occupied population’s) rights and obligations.¹¹

Upon recognizing the United States and United Kingdom as occupying powers, the UN Security Council, in Resolution 1483 of May 22, 2003, “call[ed] upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.” Of the many rights and responsibilities of an occupying power, one of the most fundamental is the obligation reflected in Article 43 of the Hague Regulations, which reads in its common English translation:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

It has been noted that the authoritative French text of the Regulations refers to “*l’ordre et la vie publics*,” i.e., public order and life, whereas the accepted English translation inexplicably substitutes “safety” for “life.”¹² This peculiarity of

translation not only creates a redundancy, insofar as it is not clear what “public safety” encompasses beyond “public order,” but, more importantly, omits the social and commercial aspects related to the broader concept of “public life.” Consistent with the authoritative text, this paper focuses on the obligation relating to “public order.”

The duty on the occupying power to “take all the measures in his power to restore, and ensure, as far as possible” public order reflects both an authorization for the occupying power and important limitations on its obligation. The duty is to take affirmative measures to provide order for the population under its control—it is not permitted to ignore chaos and unrest affecting the public even if occupying forces themselves can avoid these risks—and this obligation necessarily implies a corresponding authority to take such measures. That duty is qualified in two important regards. First, the obligation on the occupying power stops short of requiring a result; the caveat that measures be taken to ensure order “as far as possible” reflects the recognition that the occupying power may not be able to achieve public order, even upon dutifully taking all measures in its power.¹³ Second, measures taken by the occupying power to these ends must respect local law “unless absolutely prevented.” The duty to respect local law would include domestic provisions relating to human rights, unless such provisions are displaced by specific rules of the law of occupation, as the *lex specialis*, or the occupying power is “absolutely prevented” from implementing them.¹⁴

The Fourth Geneva Convention also addresses an occupying power’s duty and authority to take measures to address security in occupied territories. As a general matter, Article 27 states that parties to a conflict, whether in their own territories or in occupied territory, “may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.”¹⁵ More specifically, Article 78 of the Fourth Convention provides that in occupied territory, if an occupying power “considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.”

Article 78 acknowledges the potential threat posed by civilians in occupied territory to the occupying power; the purpose of internment pursuant to Article 78, much like detention of prisoners of war under the Third Geneva Convention, is preventative.¹⁶ The Fourth Convention leaves broad discretion to the occupying power to determine whether internment is “necessary for imperative reasons of security”; its official commentary notes only that such internment should be “exceptional” and that internment must be based on individualized threat determinations, not collective measures.¹⁷ In practice, “imperative reasons” in this context have been understood to be distinct from criminal justice standards that require,

for example, probable cause of past criminal activity or indictment for criminal prosecution. Article 78 also requires that internees have a right of appeal of the decision to detain them, and periodic review of that decision at least every six months. As discussed further below, detention operations, undertaken in reliance on Article 78, formed a crucial part of coalition forces' counterinsurgency strategy.

In the May 8 letter to the Security Council, the United States and the United Kingdom affirmed their commitment to provide for public order and security, noting that they, with coalition partners and through the CPA,

shall *inter alia*, provide for security in and for the provisional administration of Iraq, including by: deterring hostilities; maintaining the territorial integrity of Iraq and securing Iraq's borders; . . . maintaining civil law and order, including through encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; eliminating all terrorist infrastructure and resources within Iraq and working to ensure that terrorists and terrorist groups are denied safe haven. . . .¹⁸

The reference in the May 8 letter to "deterring hostilities"—drafted before the major onslaught of the insurgency—recognizes that hostilities can re-emerge in occupied territory. Armed opposition to occupation has not been viewed as negating the ongoing status of occupation so long, at least, as the opposition does not actually wrest effective control of an occupied area.¹⁹

Renewed combat during an occupation requires the occupying power to apply concurrently two branches of the law of war: the law on the conduct of hostilities will apply with regard to combatants and civilians taking direct part in hostilities, and the law of occupation will continue to apply concerning civilians not taking direct part in hostilities.²⁰ Combatants who met the criteria for prisoners of war established in the Third Geneva Convention continued to receive the protections and treatment due to prisoners of war under the laws of war. More prevalent in the Iraqi insurgency, however, were guerillas or saboteurs who did not qualify as prisoners of war and were not entitled to combatants' privileges.²¹ Such insurgents could be detained as civilians under Article 78 of the Fourth Convention and prosecuted for their hostile acts pursuant to existing local law or laws promulgated by the occupying power.

UN Security Council Authorization

By the fall of 2003, insurgent attacks had become frequent and widespread. In Resolution 1511 in October 2003, the Security Council expressly noted the terrorist bombings of the Jordanian and Turkish Embassies, the United Nations headquarters and the Imam Ali Mosque, and the murders of a Spanish diplomat and a member of the Iraqi Governing Council, Dr. Akila al-Hashimi, all of which had

occurred in the preceding 10 weeks.²² Resolution 1511 also acknowledged the Iraqi Governing Council's intent to convene a conference to prepare a new constitution, and called for the CPA to cooperate with the Governing Council and "to return governing responsibilities and authority to the people of Iraq as soon as practicable."²³ Finding that security and stability would be essential to accomplishing the political goals outlined in the Resolution, the Security Council, acting under Chapter VII of the UN Charter, which allows it to take actions necessary to maintain or restore international peace and security, went on to "[authorize] a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq."²⁴ Coalition forces, effectively already under the unified command of the United States, became known as the Multinational Force–Iraq (MNF-I).

The broad UN mandate for the MNF-I provided a legal basis for counterinsurgency and counterterrorism operations independent of the authorities in the law of war. This authorization from the Security Council was not strictly speaking necessary, as a matter of international law, for coalition forces at the time it was conveyed, because the coalition had pre-existing and robust bases upon which to provide for security. Nevertheless, it established the legal framework that would become of primary importance at the end of occupation the following year.

III. Authorization for MNF-I under UN Security Council Resolutions 1546 et seq. (June 28, 2004 to December 31, 2008)

On June 28, 2004, the belligerent occupation of Iraq by the United States and United Kingdom ended as a matter of international law, with the formal transfer of administrative authority and responsibility from the CPA to the interim government of Iraq. While in popular parlance the transfer of authority was heralded as the "transfer of sovereignty" back to Iraq, under the law of occupation, Iraqi sovereignty always remained vested in Iraq—occupying powers are simply administrators of the State until the period of occupation terminates.²⁵

The presence and activities of the MNF-I in Iraq remained sizable and significant. During this middle period, the legal bases for US military operations were the continued authorization of the UN Security Council, acting under Chapter VII of the UN Charter, and the consent of the government of Iraq, upon which the UN authorization was predicated.

UN Security Council Authorization

In anticipation of the transfer of authority to the interim government of Iraq and the end of belligerent occupation, the Security Council passed Resolution 1546 on

June 8, 2004. Acting again under Chapter VII of the UN Charter, the Security Council reiterated the authorization and mandate of the MNF-I, stating that it

shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, *inter alia*, the Iraqi request for the continued presence of the [MNF-I] and setting out its tasks, including by preventing and deterring terrorism.²⁶

One of the annexed letters, from US Secretary of State Colin Powell, explicitly notes that the agreed tasks of the MNF-I would entail combat operations, including detention operations, to address insurgent and other violent forces threatening Iraq's internal security.

The MNF stands ready to continue to undertake a broad range of tasks These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment when necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security.²⁷

Consent of the Government of Iraq

Unlike the original Security Council authorization for the MNF-I in Resolution 1511, the extension of the authorization in Resolution 1546 was premised upon the consent of the government of Iraq. Resolution 1546 noted "the Iraqi request for the continued presence of the multinational force" in the annexed letter from the Prime Minister of the Iraqi interim government, Ayad Allawi, which stated:

There continue . . . to be forces in Iraq, including foreign elements, that are opposed to our transition to peace, democracy, and security. . . . Until we are able to provide security for ourselves . . . we ask for the support of the Security Council and the international community in this endeavor. We seek a new resolution on the Multinational Force (MNF) mandate to contribute to maintaining security in Iraq, including through the tasks and arrangements set out in the letter from Secretary of State Colin Powell.²⁸

Resolution 1546 further established that the mandate for MNF-I would be reviewed "at the request of the Government of Iraq" or in twelve months, and declared that the Security Council "will terminate this mandate earlier if requested by the Government of Iraq."²⁹ Secretary of State Colin Powell separately affirmed that US forces would leave Iraq if the interim Iraqi government so requested.³⁰

The authorization of the Security Council acting under Chapter VII of the Charter and the consent of the government of Iraq would each suffice independently to provide a basis in international law for the US and coalition military presence and counterinsurgency activities in Iraq. As a political matter, however, the two grounds were mutually dependent. It is doubtful that the Security Council would have continued to authorize the MNF-I without the consent of the government of Iraq. Conversely, given the nascent state of the interim Iraqi government, it is questionable whether its consent alone would have been perceived to be fully independent and legitimate without the imprimatur of the international community for the MNF-I and its actions. As it was, the Security Council mandate for the MNF-I was annually reviewed and renewed, at the request of the government of Iraq, through December 31, 2008.³¹

Consequences of the End of Belligerent Occupation

While in popular and sometimes cynical terminology, the US and coalition presence in Iraq continued to be referred to as an “occupation” long after June 2004, as a matter of law the consent of the Iraqi government and the decision of the Security Council were each independently sufficient to terminate the occupation. First, the Security Council decision welcoming the end of occupation in Resolution 1546 could itself effect the end of belligerent occupation, given the effect of Security Council decisions under Chapter VII. Because member States of the United Nations agree to accept decisions of the Security Council, even where such decisions may conflict with otherwise applicable international law,³² the decision of the Security Council that an occupation will terminate is sufficient to make it so as a matter of international law.³³

Second, the consent of the Iraqi government also terminated belligerent occupation, and with it, the authorities and responsibilities that accrue to a belligerently occupying power under the law of war. Yoram Dinstein has noted examples of “consensual occupation,” such as the Allied powers’ presence in and administration of France, Belgium and the Netherlands at the end of World War II with the consent of the sovereign governments in exile. In such “consensual” circumstances, the established law of occupation, including Article 43 of the Hague Regulations, was not applied.³⁴

While there have been circumstances in which the military forces of a formerly occupying power remained in a country after the occupation terminated, such as in Germany and Japan in the 1950s, in those cases, the purpose of the continued foreign military presence was primarily to defend the host nation against external threats.³⁵ The end of an occupation typically presupposes that internal military operations have ceased and, under the law of war, prisoners of war and civilian

internees must be released. In the post-occupation period in Iraq, however, MNF-I military operations continued in significant force, and security detentions not only continued but increased dramatically in volume.

Which legal rules, then, applied to the post-occupation military operations in Iraq? Secretary of State Powell's letter annexed to Resolution 1546 affirmed that the "forces that make up MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions."³⁶ This commitment to the continued application of the law of war failed to clarify, however, which branches of humanitarian law were appropriate—namely, whether the situation continued to qualify as an international armed conflict subject to the full array of provisions under the Third and Fourth Geneva Conventions, or whether, given the absence of any conflict between the United States and coalition countries and the government of Iraq, it had become a non-international armed conflict, to which Common Article 3 alone among the provisions of the Geneva Conventions and other customary laws of war applied. On this question there was no consensus. The International Committee of the Red Cross (ICRC) took the view that the residual conflict between insurgent forces, on the one hand, and the United States, coalition forces and the government of Iraq, on the other, constituted a non-international armed conflict.³⁷ Others, including Adam Roberts, suggested that given the non-Iraqi character of the MNF-I and foreign insurgent fighters, and the language of Resolution 1546, the more robust provisions of the Geneva Conventions should continue to apply.³⁸

While the United States did not formally revisit its 2003 determination that the conflict was of an international character, it generally avoided characterizing the status of the conflict by pointing to the authorization in the Security Council resolution. This response can be fairly criticized for conflating *jus ad bellum* issues—the basis for the use of force, i.e., the authorization of the Security Council and the consent of the Iraqi government—with *jus in bello* questions of which rules of the law of armed conflict applied to the conduct of the MNF-I.

In practice, the MNF-I generally continued to apply the more robust rules applicable to international armed conflicts to its operations in Iraq. During this period, however, MNF-I's operations also began to shift from a purely war paradigm to a law-enforcement paradigm, which fostered cooperation with the government of Iraq and paved the way for Iraqi assumption of security responsibility. Detention operations, in particular, incorporated law-enforcement elements within the purview of the Iraqi government alongside the security detentions authorized under Resolution 1546.

The standards and procedures of MNF-I internment operations evolved over time, and increasingly worked in coordination with Iraqi law and the criminal

justice system. The day before the occupation ended, the CPA promulgated a revision to CPA Memorandum Number 3, which outlined the types of detentions MNF-I would undertake and the procedures applicable to each type.³⁹ Reflective of the US reluctance to pin down the applicability of the Geneva Conventions to post-occupation activities, the revised memorandum was careful to avoid any implication that the Fourth Convention terms on security internees continued to apply as a matter of law. Language that appeared in the original memorandum, issued in June 2003, stating that certain provisions were undertaken “in accordance with” the Fourth Geneva Convention was omitted. Indeed, the chapeau of the Revised CPA Memorandum Number 3 stated, “Determining, that the relevant and appropriate provisions of the [Fourth Convention] constitute an appropriate framework consistent with its mandate in continuance of measures previously adopted.”⁴⁰

CPA Memorandum Number 3 as revised established a review process that would satisfy the right of appeal provided in Article 78. In addition, juvenile detainees were to be held for no longer than 12 months from the date of internment, and adult internees held for 18 months were to receive review before a Joint Detention Committee, which included Iraqi participation, to authorize further internment. The revised memorandum also gave MNF-I the right to apprehend individuals who were not considered security internees but who were suspected of violating Iraqi law. Criminal detainees were to be “handed over to Iraqi authorities as soon as reasonably practicable,” though they could be kept in MNF-I custody upon Iraqi request, based on security or capacity considerations. The revised memorandum affirmed that the ICRC would continue to have access to both categories of detainees, and extended similar access to the Iraqi ombudsman for prisons and detainees.⁴¹

The procedures applicable to both security internees and criminal detainees continued to develop over the course of MNF-I’s operations in Iraq during this period. For example, the review procedures for security internees were revised to allow detainees to be present at their review board hearings.⁴² Cooperation with Iraqi authorities also increased, in particular in terms of sharing evidence to facilitate criminal prosecutions, and MNF-I and the interim Iraqi government signed a separate memorandum of understanding concerning arrangements for high-value detainees held pending prosecution for war crimes or other atrocities.

IV. January 1, 2009 to the Present

In the fall of 2007, Iraq’s political leaders announced that they sought to normalize the status of Iraq in the international community and bilaterally with the United States. This entailed foremost seeking an end to the Security Council actions under

Chapter VII that relied on a finding that the situation in Iraq constituted a “threat to international peace and security.” In November 2007, President George W. Bush and Prime Minister Nouri al-Maliki outlined their approach to these ends: Iraq requested a renewal of the MNF-I mandate from the Security Council for a final year, during which time Iraq and the United States would negotiate the details of a bilateral relationship addressing security, economic, diplomatic, political and cultural matters.⁴³ The results of these negotiations were two international agreements that entered into force on January 1, 2009: the Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq (the “Security Agreement”)⁴⁴ and the Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq (the “Strategic Framework Agreement”).⁴⁵

The Security Agreement addresses a variety of security and military issues, including authorization from the Iraqi government for US combat and detentions operations, and status provisions for US forces, while the Strategic Framework Agreement covers political, economic, and cultural cooperation.⁴⁶ Since the expiration of the UN mandate for the MNF-I and the entry into force of the Security Agreement on January 1, 2009, the legal basis for the US military presence and operations in Iraq has been the consent of the Iraqi government.

Iraqi authorization for the US military presence and operations in Iraq need not have been conveyed in a legally binding document—or even in writing—to be valid as a matter of law. There were advantages, however, to memorializing Iraqi authorization in a public, binding instrument. First, reducing the terms of the arrangement into such a document ensured transparency as to the terms under which US forces remain in Iraq. Second, placing the authorization in a legally binding international agreement rendered it, under Iraqi domestic law, subject to the approval of the Iraqi Council of Representatives, which enhanced the legitimacy of the arrangement within Iraq.

Consent of the Government of Iraq

Acknowledging ongoing insurgent and terrorist acts, Article 4 of the Security Agreement reflects Iraqi consent for US forces’ presence in Iraq and defines the purpose of their mission: “The Government of Iraq requests the temporary assistance of the United States Forces for the purposes of supporting Iraq in its efforts to maintain security and stability in Iraq, including cooperation in the conduct of operations against al-Qaeda and other terrorist groups, outlaw groups, and remnants of the former regime.”⁴⁷

This authorization departs significantly in a number of respects from the broad UN mandate for the MNF-I to take “all necessary measures” to provide for security and stability in Iraq. The Security Agreement reflects the Iraqi assumption of primary responsibility for security in Iraq; consequently, the US mission is framed in terms of “supporting Iraq in its efforts.” Consistent with this approach, the agreement requires that all such military operations are subject to the agreement of the government of Iraq and must be coordinated with Iraqi authorities.⁴⁸

Detention operations under the Security Agreement also reflect a significant departure from the law of war detentions the coalition undertook under the Article 78 framework in the earlier phases of its activities. Under a law of war framework, detentions are conceived of as incident to military combat authorities; under the Security Agreement, detentions are addressed separately from the authorization to conduct military operations and are integrated into Iraqi law-enforcement operations. Article 22 of the Security Agreement addresses two categories of detainees: the so-called “legacy security detainees,” individuals in US custody at the time the agreement came into force who had been taken into custody by the MNF-I under UN authorization, and new captures who would come into US forces’ custody after the entry into force of the agreement.⁴⁹

Signaling the end of law of war security internment, the agreement outlines the three general disposition options for legacy security detainees. Under the agreement, the government of Iraq is to review the cases of all of the approximately 15,800 legacy security detainees to determine whom it could criminally prosecute.⁵⁰ Detainees for whom Iraqi authorities issued a valid criminal arrest warrant and detention order are to be transferred to Iraqi authorities for prosecution. Detainees against whom a criminal case cannot or was not brought must be released by US forces “in a safe and orderly manner, unless otherwise requested by the Government of Iraq and in accordance with Article 4 of this Agreement.”⁵¹ Such a request by the government of Iraq for another disposition might include repatriation to a third country. Iraqi authorities may also request that a detainee remain in US custody pending prosecution if Iraqi authorities determine that they do not have the capacity to detain certain criminal suspects safely and humanely in custody.

Resolving the cases of the thousands of security detainees in US custody has proved time-consuming and politically delicate. By December 2009, 1,441 legacy security detainees had been transferred to Iraqi authorities for prosecution, 7,499 legacy security detainees had been released and approximately 4,600 detainees remained in US custody. US forces estimated that disposition of all detainees would not be complete until August 2010.⁵² The Security Agreement does not specify a timetable for the completion of this process, and the requirement that releases occur in “safe and orderly manner” reflects an understanding that releases will be

implemented with care to facilitate the safety of the individual and the stability of Iraqi society. To mitigate security risks, US forces release detainees whom Iraqi authorities determined would not be prosecuted in order of least to greatest security threat. While many welcomed the end of “indefinite” MNF-I detentions, the release of these detainees was also criticized as contributing to an uptick in violence.⁵³

Under the Security Agreement, new captures are processed in accordance with the domestic judicial system. The agreement precludes US forces from arresting or detaining individuals “except through an Iraqi decision issued in accordance with Iraqi law and pursuant to Article 4” of the Security Agreement, which authorizes US military operations and requires US forces to respect Iraqi law.⁵⁴ The preference is to arrest individuals pursuant to an Iraqi-issued arrest warrant. If a warrant is not feasible, individuals may be taken into US forces’ custody and must be turned over to a competent Iraqi authority within 24 hours, at which point Iraqi authorities determine whether continued detention is warranted.

As during the second phase of the conflict, questions remain about how to characterize the nature of US engagement in Iraq. Given the normalized bilateral relationship between the two countries, there is little basis for the position that the conflict remains of an international character. The ICRC continues to view the situation in Iraq as constituting a non-international armed conflict.⁵⁵ However, the government of Iraq has not publicly characterized the state of affairs as an armed conflict or invoked the state of emergency provisions in its constitution. Moreover, in its handling of detention operations, it strictly follows a law-enforcement model. While the United States also has declined to publicly characterize the status of its activities, US forces remain at all times bound by the rules of Common Article 3 of the Geneva Conventions and other customary rules of the law of war.

Finally, although the United States has not asserted this ground, the possibility exists—at least in theory—that during any of these phases the United States could have asserted a self-defense basis for conducting counterterrorism operations in Iraq against Al Qaeda and its affiliates, even if the government of Iraq requested that US forces depart. Such an argument would likely require the United States to determine that the host nation was itself unable or unwilling to address the threat posed by Al Qaeda as a prerequisite to asserting that intervention without host-nation consent would be warranted. While the United States has not relied on this theory, and any such assertion during the duration of the Security Agreement would provoke difficult questions about compliance with international legal obligations incurred under the Security Agreement, the self-defense basis remains a theoretical, if highly speculative, option.

Notes

1. Address to the Nation on Iraq from the USS Abraham Lincoln, 1 PUBLIC PAPERS 410 (May 1, 2003), full text *available at* WASHINGTONPOST.COM, May 1, 2003, <http://www.washingtonpost.com/ac2/wp-dyn/A2627-2003May1>.
2. *See, e.g.*, DoD News Briefing with Gen. Raymond Odierno from Iraq, DEFENSE.GOV, Oct. 1, 2009, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4490>.
3. Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention No. IV Respecting the Laws and Customs of War on Land art. 42, Oct. 18, 1907, 36 Stat. 2227, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 69 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).
4. *Id.*
5. Letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council, U.N. Doc. S/2003/538 (2003) [hereinafter US/UK Letter].
6. S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).
7. On the insurgency generally, *see, e.g.*, AHMED S. HASHIM, INSURGENCY AND COUNTER-INSURGENCY IN IRAQ (2006); Kenneth Katzman, *Iraq: U.S. Regime Change Efforts and Post-Saddam Governance*, CRS REPORT FOR CONGRESS 29–31 (Jan. 7, 2004), *available at* <http://fpc.state.gov/documents/organization/28648.pdf>; Lionel Beehner, *Iraq: Status of Iraq's Insurgency*, Council on Foreign Relations Backgrounder (Sept. 13, 2005), <http://www.cfr.org/publication/8853/iraq.html>.
8. S.C. Res. 1511, U.N. Doc. S/RES/1511 (Oct. 16, 2003).
9. *See, e.g.*, Andru E. Wall, *Was the 2003 Invasion of Iraq Legal?*, which is Chapter IV in this volume, at 69.
10. *In re* List (Hostages Trial, 1948), 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 34 (1949).
11. YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 3 (2009).
12. *Id.* at 89; EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 7 n.1 (2d ed. 2004).
13. DINSTEIN, *supra* note 11, at 92–93.
14. The relation between international humanitarian law and international human rights law in circumstances of armed conflict remains much debated and generally unsettled. For discussion of the interaction between the law of war and human rights law in the context of maintaining order in occupied territory, *see* Kenneth Watkins, *Maintaining Law and Order During Occupation: Breaking the Normative Chain*, 41 ISRAEL LAW REVIEW 175, 189 (2008).
15. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 3, at 301.
16. COMMENTARY ON THE FOURTH GENEVA CONVENTION OF 12 AUGUST 1949, at 368 (Jean S. Pictet ed., 1952) (“Article 78 relates to people who have not been guilty of any infringement of the penal provisions enacted by the Occupying Power, but that Power may, for reasons of its own, consider them dangerous to its security and is consequently entitled to restrict their freedom of action”).
17. *Id.*
18. US/UK Letter, *supra* note 5.
19. Adam Roberts, *The End of Occupation: Iraq 2004*, 54 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 27, 34 (2005) (noting that “in practice the status of occupation has not been viewed as being negated by the existence of violent opposition, especially when that opposition has not had full control of a portion of the state’s territory”).
20. *See* DINSTEIN, *supra* note 11, at 100.

21. *Id.* at 94–95. Von Glahn notes the view that insurgents who pledged allegiance to the government in exile, aimed to drive out the occupying forces and followed the laws of war (excepting the requirements to openly carry arms and display identifying insignia) should be treated as lawful combatants. GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY* 52 (1957). The modern view has rejected this position, and in any event, most insurgents in Iraq would fail to meet even von Glahn’s more permissive criteria, as most did not act on behalf of the Baathists and failed to abide by the law of war.

22. S.C. Res. 1511, *supra* note 8.

23. *Id.*, paras. 6, 10.

24. *Id.*, para. 13.

25. Roberts, *supra* note 19, at 41; DINSTEIN, *supra* note 11, at 49, citing L. Oppenheim, *The Legal Relations between an Occupying Power and the Inhabitants*, 33 *LAW QUARTERLY REVIEW* 363, 364 (1917) (“[t]here is not an atom of sovereignty in the authority of the Occupying Power”); VON GLAHN, *supra* note 21, at 31. Accordingly, Security Council Resolutions S.C. Res. 1483, *supra* note 6; S.C. Res. 1511, *supra* note 8; and S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004), all relating to Iraq during the period of belligerent occupation, recognized Iraq’s continuing “sovereignty.”

26. S.C. Res. 1546, *supra* note 25, para. 10.

27. *Id.* at 10 (Annexed letter from United States Secretary of State Colin Powell to Lauro L. Baja, Jr., President of the Security Council, dated June 5, 2004) [hereinafter Powell Letter].

28. *Id.* at 8 (Annexed letter from Prime Minister of the Interim Government of Iraq Dr. Ayad Allawi to Lauro L. Baja, Jr., President of the Security Council, dated June 5, 2004).

29. *Id.*, para. 12.

30. Glenn Kessler, *Powell Says Troops Would Leave Iraq if New Leaders Asked*, WASHINGTON POST, May 15, 2004, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A27950-2004May14.html>.

31. S.C. Res. 1637, U.N. Doc. S/RES/1637 (Nov. 8, 2005); S.C. Res. 1723, U.N. Doc. S/RES/1723 (Nov. 28, 2006); S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007).

32. U.N. Charter arts. 25, 103.

33. See DINSTEIN, *supra* note 11, at 273. This power of the Security Council is widely recognized, though in tension with the general principle that whether an occupation exists depends on the facts on the ground rather than the statements or characterizations of the parties.

34. *Id.* at 37. Dinstein further notes that when status of consent changes, occupation may take on belligerent character. He cites the case of German forces in Italy in the Second World War, which initially established a presence with the consent of Mussolini, but acquired the status of belligerent occupiers after the Mussolini government fell and the royal government declared war on Germany.

35. Roberts, *supra* note 19, at 29–30.

36. Powell Letter, *supra* note 27.

37. See, e.g., Posting of the International Committee of the Red Cross, Iraq post 28 June 2004: protecting persons deprived of freedom remains a priority, <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList322/89060107D77D7299C1256EE7005200E8>.

38. Roberts, *supra* note 19, at 47. For further discussion of the characterization of the conflict over time, see David Turns, *The International Humanitarian Law Classification of Armed Conflicts in Iraq since 2003*, which is Chapter VI in this volume, at 97.

39. CPA Memorandum Number 3 (Revised), Criminal Procedures (Revised) (June 27, 2004), available at <http://www.iraqcoalition.org/regulations/#Orders> (then the Criminal Procedures (Revised) hyperlink). Compare CPA Memorandum Number 3, Criminal Procedures

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(June 18, 2003), available at www.gjpi.org/wp-content/uploads/cpa-memo-3-og.pdf. At the end of occupation, all CPA orders and memoranda became incorporated into Iraqi domestic law until rescinded or amended, under Article 26(c) of the Law of Administration for the State of Iraq During the Transitional Period, Mar. 8, 2004, available at <http://www.cpa-iraq.org/government/TAL.html>.

40. CPA Memorandum Number 3 (Revised), *supra* note 39; CPA Memorandum Number 3, *supra* note 39.

41. CPA Memorandum Number 3 (Revised), *supra* note 39.

42. See Brian J. Bill, *Detention Operations in Iraq: A View from the Ground*, which is Chapter XVII in this volume, at 411, for a discussion of the revised review procedures.

43. Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship between the Republic of Iraq and the United States of America, Nov. 27, 2007, available at <http://merln.ndu.edu/archivepdf/iraq/WH/20081204-6.pdf>.

44. Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008, available at http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf [hereinafter Security Agreement].

45. Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq, U.S.-Iraq, Nov. 17, 2008, available at https://www.mnf-iraq.com/images/CGs_Messages/strategic_framework_agreement.pdf.

46. The security agreement is often referred to as a SOFA, or status of forces agreement. While it addresses typical status provisions, such as jurisdiction over US forces, taxation, import and export, and entry and exit of forces, it includes additional provisions, such as authorization for military operations and a timetable for the withdrawal of forces, unusual in SOFAs because SOFAs generally govern the status of forces in foreign territory during peacetime. Status provisions for the MNF-I had been addressed in an order promulgated by the CPA prior to the end of occupation, the effective period of which by its terms was tied to the UN mandate of the MNF-I and its presence in Iraq. CPA Order Number 17 (Revised), Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq, sec. 20 (June 27, 2004), available at <http://www.iraqcoalition.org/regulations/#Orders> (then the Status of the CPA, MNF-I, Certain Missions and Personnel in Iraq hyperlink).

47. Security Agreement, *supra* note 44, art. 4(1).

48. *Id.*, art. 4(2).

49. *Id.*, art. 22.

50. Blackanthem Military News, Inaugural Meeting of Detention Committee – GOI and MNF-I (Dec. 11, 2008), <http://www.blackanthem.com/News/iraqi-freedom/Inaugural-Meeting-of-Detention-Committee---GoI-and-MNF-I19014.shtml>.

51. Security Agreement, *supra* note 44, art. 22(4).

52. *U.S. Timetable for Handing Over Iraq Detainees Slips*, REUTERS.COM, Dec. 7, 2009, <http://www.reuters.com/article/idUSTRE5B629P20091207>.

53. Interview by Jim Muir, BBC News, with Prime Minister Maliki, in Baghdad, Iraq (Apr. 27, 2009), http://news.bbc.co.uk/2/hi/middle_east/8020815.stm.

54. Security Agreement, *supra* note 44, arts. 22(1), 4(1)–(5).

55. See Philip Spoerri, Director of International Law, International Committee of the Red Cross, Official Statement at the Ceremony to Celebrate the 60th Anniversary of the 1949 Geneva Conventions: The Geneva Conventions of 1949: Origins and Current Significance (Aug. 12, 2009), <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/geneva-conventions-statement-120809?opendocument>.